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No. 959

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963.

BUILDERS' ASSOCIATION OF KANSAS CITY,
Petitioner,

vs.

GREATER KANSAS CITY LABORERS DISTRICT COUNCIL OF THE INTERNATIONAL HOD CARRIERS BUILDING AND COMMON LABORERS UNION OF AMERICA OF GREATER KANSAS CITY AND VICINITY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Builders' Association of Kansas City prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled case on January 23, 1964.

CITATIONS TO OPINIONS BELOW

A memorandum opinion of the District Judge, ruling on petitioner's motion to dismiss and stating reasons for entering judgment for respondent, is reported in 213 F. Supp. 429, and is printed in the Appendix hereto, *infra*, p. A1. A further opinion and final order of the District Judge is reported in 217 F. Supp. 1, and appears as part of the printed record, nine copies of which have been filed herein, beginning at R. 59.

The opinion of the Court of Appeals is reported in 326 F.2d 867, and is printed in the Appendix hereto, *infra*, p. A16.

JURISDICTION

The judgment of the Court of Appeals was entered on January 23, 1964. Appendix, p. A21, *infra*. Rehearing was denied on February 28, 1964, Appendix, p. A22, *infra*. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether United States District Courts have equity jurisdiction or authority to grant specific enforcement of arbitration clauses in collective bargaining agreements under which creative or quasi-legislative arbitration of new contracts is sought.

2. Whether, in construing the intent of the parties respecting arbitrability, Federal Courts must follow a presumption of arbitrability even when quasi-legislative arbitration of new contracts is sought, or are directed to deny

such arbitration when the procedural provisions of the arbitration clause limit arbitration to the processing of individual grievances, and do not pertain to disputes between employers and unions.

3. Whether the doctrine of "unclean hands" bars equitable enforcement by Federal Courts of an arbitration demand under a collective bargaining agreement, when the demand sought to be arbitrated seeks an illegal result; *i.e.*, contributions by employers to a welfare fund in which they do not share administration, as required by Federal statute.

STATUTES INVOLVED

A statutory provision involved is Section 301(a) of the Labor Management Relations Act of 1947, 61 Stat. 156, 29 U.S.C. Section 185(a), which provides:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

An additional statutory provision involved, in connection with the Third Question Presented, is Section 302 of the Labor Management Relations Act of 1947, as amended, 61 Stat. 157, 73 Stat. 537, 29 U.S.C., Section 186. This section is set out verbatim in the Appendix, *infra*, p. A22. It prohibits, in part, the payment by an employer to a welfare fund unless "the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers

are equally represented in the administration of such fund. . . ." 29 U.S.C., Section 186(c)(5)(B).

STATEMENT

Suit was filed in the District Court by respondent labor organization, to obtain an order requiring petitioner, an organization representing employers, to submit to arbitration the creation of a new agreement respecting a health and welfare insurance program (R. 1-3). Respondent alleged that petitioner had refused to submit the creation of such a program to arbitration, in alleged violation of an earlier agreement between the parties; and averred that the District Court had jurisdiction to grant the relief prayed, under Section 301 of the Labor Management Relations Act of 1947 (R. 2-3).

After overruling of a motion to dismiss, based essentially on the first two questions here presented (R. 4), the parties stipulated the following facts (R. 7-14): Respondent, a District Council, composed of delegates from affiliated locals, entered into collective bargaining agreement with petitioner on June 16, 1960 (R. 7-9). In the 1960 agreement it was agreed, among other things, that effective April 1, 1962, contributions by employers would be made under "a health and welfare insurance program in accordance with a Trust Agreement to be agreed upon between the parties" (R. 33). Beginning in January, 1962, negotiations relative to the welfare provisions began (R. 10-11). The District Council permitted petitioner to negotiate directly with the locals (R. 11), in accordance with some past practice (R. 9). In April, 1962, an agreement was entered into between petitioner and the locals (R. 11), and the plan there agreed to is now actively functioning (R. 13). Members of petitioner are making

contributions on employees covered by the 1960 agreement (R. 13).

Respondent District Council contends the locals are not authorized to make binding contracts with petitioner (R. 9) and insists that all contributions made pursuant to the above-quoted general commitment in the 1960 agreement be paid into an existing fund in Jefferson City, Missouri (R. 11), in the administration of which petitioner's members have no representation (R. 11-12).

Several months after welfare agreements were entered into with the locals, respondent demanded that a new welfare program be created by arbitration (R. 42, 43). Respondent filed suit in State Court to prevent consummation of the agreements with the locals (R. 45), which suit resulted in a judgment in favor of petitioner and the intervening locals (R. 58-9). Thereafter, this suit was filed by respondent, to compel arbitration creating a new welfare program.

The arbitration clause in the 1960 agreement upon which suit was based, provides: "There shall be no stoppage of work on account of any differences which may occur between a member or members of the Association and the Union. If the matter cannot be adjusted between the parties involved, it shall be taken up between a representative of the Union and a representative of the Association. . ." and shall thereafter be processed through arbitration (Article IX, R. 33). The 1960 contract also provides: "Should the Steward and the Contractor or the Contractor's representative be unable to adjust any grievance, dispute or complaint without delay, the Steward shall immediately notify the Business Representative of the Union (who) shall then attempt to adjust the grievance, dispute or complaint." (Article V(1), R. 33).

The arbitration provisions in the 1960 agreement were carried over from an earlier contract (R. 10). In negotiations, there was no discussion of whether the arbitration clause would be applicable to the creation of a health and welfare program (R. 10).

In granting judgment for respondent, the Courts below invoked a presumption in favor of arbitrability, and held the parties "intended" to submit to creative arbitration a disagreement between themselves as to a health and welfare program, despite the foregoing language of the arbitration clause, indicating an intent to submit to arbitration only the grievances of individuals, which could not be "adjusted between the parties involved" or at a higher level. 213 F. Supp. 429, 432-3; Appendix pp. A6-7; 217 F. Supp. 1, 3-4; R. 62-4; 326 F.2d 867, 869; Appendix p. A19.

After finding that the parties "intended" to submit to creative arbitration, the Courts below held that Federal Courts have equity jurisdiction to force such arbitration, and expressly rejected the contrary rule existing in the First Circuit. 213 F. Supp. 429, 435; Appendix p. A12; 326 F.2d 867, 870; Appendix p. A21.

The District Court refused to apply the "clean hands" doctrine, holding that even if respondent was seeking a violation of Federal law, it was nevertheless entitled to arbitration of the question. 217 F. Supp. 1, 9; R. 71-2. The Court of Appeals likewise failed to rule on the legality of respondent's demand.

REASONS FOR GRANTING THE WRIT

1. The major public concern in this litigation is in resolving a conflict between the Circuits on an important, recurring question of Federal equity jurisdiction in labor cases.

This case presents in sharp focus a question repeatedly presented to the Federal Courts since 1956. In January of this year, a comment in a leading law review stated that "agreements to arbitrate the provisions of a new or renewed contract not only have been opposed by both labor and management, but also have been held unenforceable by the courts." "Quasi-Legislative Arbitration Agreements," 64 Columbia Law Review 109, citing the District Court decision below as representing a minority view. Until this litigation, the only line of authority on the issue was based on litigation decided in 1956 by Judge Wyzanski, whose opinion was subsequently affirmed by the Court of Appeals for the First Circuit. *Boston Printing Pressmen's Union* v. *Potter Press*, D.C. Mass., 141 F. Supp. 553, affirmed 1 Cir., 241 F.2d 787 (1957), cert. denied 335 U.S. 817. The views there expressed are considered binding today in the First Circuit. *In re Valencia Baxt Express, Inc.*, D.C. P.R., 199 F. Supp. 103 (1961). Three other Courts of Appeals have considered the issue here involved, but have been able to avoid decision. *Livingston* v. *John Wiley & Sons*, 2 Cir., 313 F.2d 52, 60 (1963); *Parks* v. *I.B.E.W.*, 4 Cir., 314 F.2d 886, 909, note 34 (1963); *M. K. & O. Transit Lines, Inc.*, v. *Division 892, Amalgamated Association, etc.*, 10 Cir., 319 F.2d 488, 490 (1963). It is submitted that the considered view of the First Circuit should now be accepted or rejected by this Court in order to lay to rest an important, recurring issue.

The nature of the issue has never been better expressed than in the original opinion of Judge Wyzanski. In that case (141 F. Supp. 553), the Court was presented the question of judicial enforceability of an agreement to submit to arbitration the creation of a new contract to govern employment conditions at defendant's plant. For the convenience of the Court, petitioner excerpts at length from the opinion:

"In short, the Court is asked to direct what may conveniently be described as a *prospective* or *quasi-legislative* arbitration establishing future labor conditions not *specifically* envisaged in their earlier contract. This is, at least with respect to industrial labor problems, a novel problem not hereto adjudicated by a federal court acting under the asserted authority of Section 301 of the Taft-Hartley Labor Management Relations Act of 1947 . . . (l.c. 554).

". . . (I)t (would not) be sound for this Court to conclude that *all* kinds of arbitration under collective bargaining contracts, *quasi-judicial* as well as *quasi-legislative*, *retrospective* as well as *prospective*, fall outside the permissible ambit of (Federal judicial enforcement). . . . However, nothing decided by the Court of Appeals in the *General Electric* case (232 F.2d 85—thereafter affirmed, 353 U.S. 547) disposes of defendant's contention that there is no constitutional or statutory warrant for enforcement of the particular type of arbitration provision here at stake —a provision admittedly having chiefly a prospective or quasi-legislative impact to govern, or establish the rules for, future labor relations between the parties. . . .

"But even if it be assumed that the Constitution authorizes Congress to confer upon Article III Courts the power to enforce quasi-legislative arbitral awards pursuant to collective bargains: there remains the question whether Congress has done so (l.c. 556).

"Legislation specifically addressed to this problem does not exist. Nothing in the text or history of the Taft-Hartley Act speaks on this precise subject. When in 1925 the first version, and in 1947 the second version, of the United States Arbitration Act were enacted Congress did not explicitly or impliedly cover this point. The whole structure of these enactments is obviously concerned with quasi-judicial, not quasi-legislative disputes. Each section is on the assumption that what is dealt with is the ordinary, not the

extraordinary, grist of the judicial mill (citing) (l.c. 556-7).

"Furthermore, the problems of quasi-legislative arbitral awards have generally been thought by state courts to be beyond the intended reach of a judicially enforceable arbitration statute, unless, at any rate, the legislature spoke clearly in favor of the widest possible interpretation (citing). . . .

"Perhaps more important than the considerations heretofore stated is the point that this controversy deals not merely with a prospective quasi-legislative arbitral award, but with an award in the delicate area of labor relations. This is to be sure not technically an example of an orthodox attempt at 'compulsory arbitration.' Yet it comes, in substance, perilously close. . . . Moreover, the national representatives of employers and employees who were faced with the Taft-Hartley Bill, and the legislators who enacted it, are not shown to have adverted to the possibility that Section 301 . . . would make judicially enforceable provisions such as Article 17 of the contract now at bar. . . .

"So many doubts are stirred that a court would do well to move warily . . . this Court deems it undesirable to jump into what may be a bottomless pit of dispute over future working conditions: Perhaps on reflection, no one would be happy to have judges again exercising quasi-legislative magistracy over labor problems of uncertain dimension.

"In any event, if the Courts are to go into the field of quasi-legislative labor awards let the representatives of the workers, the representatives of the employers, and above all the representatives of the people make themselves first heard in the halls of Congress. It would be unsound for a judge to rely upon the haphazard chances of litigation where counsel represent discrete parties not general partisan interests, and where the judge, not being informed of the legis-

lative will, may tend arbitrarily to over-accentuate his particular parochial experience . . . (l.c. 557)."

In response to this statement of reasons for avoiding unauthorized assumption of jurisdiction over *creative* arbitration, the Courts below summarily speculated that subsequent "teachings of the Supreme Court" render the First Circuit rule "far too weak a peg upon which to hang a reversal" (326 F.2d 867, 870; Appendix, *infra*, p. A21. See also Appendix p. A12).

Since none of the decisions of this Court deal with creative or quasi-legislative labor arbitration, it is difficult to understand the inference drawn below that a Federal court having jurisdiction over quasi-judicial arbitration must have like jurisdiction over quasi-legislative arbitration. Such an assumption ignores entirely the rationale of Judge Wyzanski's opinion and of the opinion of the Court of Appeals for the First Circuit, holding that the question of quasi-legislative jurisdiction "differs radically" from the question of quasi-judicial jurisdiction (241 F.2d 787, 789).

It is respectfully submitted that the conflict between the Circuits on this important issue should be settled in the case at bar.

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2. A secondary, but significant, reason for granting a writ is to correct a plain error below in construing the arbitration clause. In attempting to follow certain directions of this Court in quasi-judicial cases to resolve all doubts in favor of arbitration (*United Steelworkers v. Warrior & Gulf Navigation Company*, 363 U.S. 574, 582-3 (1960)), the Courts below neglected to follow a method of construction subsequently used in this Court, whereby general language relating to arbitration has been restricted in light of arbitration procedures showing limitation on the availability of remedies. Thus, in *Atkinson v. Sinclair*

Refining Company, 370 U.S. 238, 241-3 (1962), the Court examined the entire contract to determine arbitrability and held that the employer was not a party who could invoke arbitration. Thereafter, relying on *Atkinson*, the Court of Appeals for the Sixth Circuit held that controversies originating between a union and the employer were not arbitrable, where analysis of the arbitration procedures showed that only individual grievances were to be processed thereunder. *Local Union No. 998, etc.*, v. *B. & T. Metals Co.*, 315 F.2d 432, 437 (1963); *Timken Roller Bearing Co.* v. *N.L.R.B.*, 6 Cir., 325 F.2d 746, 751-3 (1963).

The case at bar would clearly be ruled in the Sixth Circuit in favor of petitioner. The arbitration clause here deals with "differences" between union and association *members*, not between the union and the association as such (R. 33). Only after a dispute cannot be adjusted "between the parties involved" is it considered by union and association representatives (R. 33). It is apparent that any method of construction looking to the procedures preliminary to arbitration would require the conclusion that the present dispute, originating between respondent and petitioner, is not within the arbitration clause.

It is further submitted that there was plain error in relying on a presumption that the parties intended arbitrability when the controversy at bar would require creative arbitration, notoriously "opposed by both labor and management". 64 Columbia Law Review 109, *supra*.

3. Finally, it is submitted that there was plain error in refusing to rule on the important question, whether the illegality of respondent's demand, under 29 U.S.C., Section 186(c)(5)(B) bars granting of relief in equity. Neither Court below decided whether employer members of petitioner could lawfully contribute to a fund administered by representatives of another employer association.

(A similar issue would be raised if petitioner were insisting that respondent accept the administration of another or rival labor organization. See *Copra v. Suro*, 1 Cir., 236 F. 2d 107, 116 (1956).)

Recognizing that a Federal District Court should not, preliminary to arbitration, ordinarily make a judgment on the "merits" of a controversy; the present issue of illegality poses a question within the Court's peculiar expertise. Moreover, no labor legislation heretofore enacted repeals the normal requirement of a court of equity that a plaintiff with "unclean hands" is not entitled to judicial assistance.

Conscience and good faith have always been required of litigants seeking to invoke the equity jurisdiction of the Federal courts. *Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946). "A plaintiff who seeks to invoke (Federal judicial) power for the purpose of consummating a transaction in clear violation of the law" cannot expect assistance from the Federal courts. *Johnson v. Yellow Cab Transit Co.*, 321 U.S. 383, 387 (1944). Mr. Justice Frankfurter, disagreeing on the circumstances of the case, wrote (l.c. 402), "where the relief sought is . . . the very means . . . for completing an outlawed transaction, a court of equity should withhold its aid and not become the promoter of wrongdoing."

It is submitted that the Courts below committed serious error in ordering arbitration of an illegal demand.

CONCLUSION

It is respectfully submitted that a writ of certiorari should be granted, to resolve a conflict between the Circuits on an important question of Federal equity juris-

diction to order "creative" arbitration of new labor agreements. Further, the case at bar contains important questions, for determination by this Court, respecting the rules of construction for arbitration clauses in labor agreements and respecting the defense of illegality when judicial enforcement of an arbitration demand is sought.

Respectfully submitted,

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APPENDIX

Original Opinion of District Court—213 F. Supp. 429

JOHN W. OLIVER, District Judge.

The parties entered into a collective bargaining agreement effective June 17, 1960. By its terms it is to remain in full force and effect until at least March 31, 1965. That agreement declares that its purpose was "to prevent strikes and lockouts and to facilitate peaceful adjustment of grievances and disputes between employers and employees" and "to establish the necessary procedure by which those ends may be accomplished".

Article IX of the agreement, entitled "Arbitration", provided that:

> "There shall be no stoppage of work on account of any differences which may occur between a member or members of the Association and the Union. If the matter cannot be adjusted between the parties involved, it shall be taken up between a representative of the Union, and a representative of the Association. If then the matter cannot be settled satisfactorily, it shall be immediately referred to an Arbitration Board consisting of three members appointed by the Association and three members appointed by the Union. These six men shall have authority to choose a neutral third party who shall act as arbiter and the decision of the arbiter shall be final and binding upon both parties and must be in writing."

Article VI of the agreement, entitled "Health and Welfare", provided that:

> "Effective April 1, 1962, ten cents (10¢) per hour for all classifications shall be paid by employers into a

health and welfare insurance program in accordance with a Trust Agreement to be agreed upon between the parties.

"At the time of the establishment of such Health and Welfare Plan, provisions may be inserted in this Agreement to authorize suit for the collection of any delinquent accounts owing to such Health & Welfare Fund."

Plaintiff's complaint in this Court alleges that since the execution of the agreement the parties "have been unable to agree to a Trust Agreement as provided by Article VI" of the agreement. Plaintiff alleges further that since "April 1, 1962, plaintiff has repeatedly requested defendant to arbitrate the dispute which has arisen under Article VI of the agreement, pursuant to the provisions of the contract set forth in Article IX" and that "defendant has failed and refused to agree to arbitrate or to take any steps toward arbitrating the dispute which exists under the agreement". Plaintiff prays for an order "directing the defendant to arbitrate the dispute * * * and for such further relief as this Court may deem appropriate under the premises".

Defendant's motion to dismiss alleges that plaintiff's complaint should be dismissed because "the issue or dispute concerning Article VI * * * are outside the scope of the arbitration clause of the collective bargaining agreement (Article IX)" and because "the complaint asks a judicial enforcement of arbitration concerning prospective or future terms of a contract or Trust Agreement, and is not enforceable under Section 301 of the Labor Management Relations Act of 1947".

As did Judge Henley in Couch v. Prescolite Manufacturing Corporation, W.D.Ark.1961, 191 F.Supp. 737, 739, we shall, as authorized by Rule 12(b) of the Rules of Civil

Procedure, treat defendant's motion to dismiss as a motion for summary judgment in order that the entire collective bargaining agreement be a part of the record.

Almost contemporaneously with the effective date of the agreement here involved but before the agreement was actually signed, the Supreme Court of the United States handed down its decisions in United Steelworkers v. American Mfg. Co., 363 U.S. 564, 80 S.Ct. 1343, 4 L.Ed.2d 1403 (1960), United Steelworkers v. Warrior & Gulf Co., 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960) and United Steelworkers v. Enterprise Corp., 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960). Those cases but added to the development of the enforcement of the federal policy relating to the enforcement of labor agreements as announced both by the Congress in 1947 and by the Supreme Court in three earlier cases decided in 1957. Those cases, Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 77 S.Ct. 912, 923, 1 L.Ed.2d 972 (1957), General Electric Co. v. Local 205, 353 U.S. 547, 77 S.Ct. 921, 1 L.Ed.2d 1028 (1957), and Goodall-Sanford v. Textile Workers, 363 U.S. 550, 77 S.Ct. 920, 1 L.Ed.2d 1031 (1957), should also be read with the still later cases of Sinclair Refining Co. v. Atkinson, 370 U.S. 195, 82 S.Ct. 1328, 8 L.Ed.2d 440 (1962), Atkinson v. Sinclair Refining Co., 370 U.S. 238, 82 S.Ct. 1318, 8 L.Ed.2d 462 (1962) and Drake Bakeries v. Local 50, Bakery Workers, 370 U.S. 254, 82 S.Ct. 1346, 8 L.Ed.2d 474 (1962), in order to obtain a full view of the rapid developments that have occurred in this area of labor law since 1957.

In Lincoln Mills, the Supreme Court noted (353 U.S. l.c. 454, 77 S.Ct. l.c. 916, 1 L.Ed.2d 972) that the Congressional philosophy of § 301 was well summed up on page 17 of Senate Report No. 105, 80th Congress, 1st Session. It was there stated:

"Statutory recognition of the collective agreement as a valid, binding, and enforceable contract is a logical and necessary step. It will promote a higher degree of responsibility upon the parties to such agreements, and will thereby promote industrial peace."

And more importantly for this case, Lincoln Mills held (353 U.S. 1, c. 455, 77 S.Ct. 1, c. 917, 1 L.Ed.2d 972) that the legislation "expresses a federal policy that federal courts should enforce these agreements on behalf of or against labor organizations and that industrial peace can be best obtained only in that way". Lincoln Mills also requires (353 U.S. 1, c. 456, 77 S.Ct. 1, c. 917, 1 L.Ed.2d 972) that "the substantive law to apply in suits under § 301(a) is federal law, which the courts must fashion from the policy of our national labor laws". And "judicial inventiveness" on the part of the federal court is invited, dependent, of course, upon the nature of the problem involved (353 U.S. 1, c. 457, 77 S.Ct. 1, c. 918, 1 L.Ed.2d 972).

American emphasized what was said earlier in Lincoln Mills and held (363 U.S. 1, c. 566, 80 S.Ct. 1, c. 1345, 4 L.Ed 2d 1403) that the national labor policy established by the Labor Management Relations Act of 1947 "can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play". And, if arbitration is provided for by the parties themselves, "the function of the court is very limited" and "is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract" (363 U.S. 1, c. 567-568, 80 S.Ct. 1, c. 1346-1347, 4 L.Ed.2d 1403). Mr. Justice Brennan, in his concurring opinion, cautions that "[t]he meaning of the arbitration promise is not to be found simply by reference to the dictionary definitions of the words the parties use, or by reference to the interpretation of com-

mercial arbitration clauses" (363 U.S. l.c. 570, 80 S.Ct. l.c. 1347, 4 L.Ed.2d 1403). But even though the words in a collective bargaining agreement are to be "rightly viewed by the Court to be the charter instrument of a system of industrial self-government, like words in a statute, and are to be understood only by reference to the background which gave rise to their inclusion"; nevertheless, we are admonished not to forget that "since arbitration is a creature of contract, a court must always inquire, when a party seeks to invoke its aid to force a reluctant party to the arbitration table, whether the parties have agreed to arbitrate the particular dispute" and to remember that "the question of whether a dispute is 'arbitrable' is inescapably for the court".

In Warrior, the labor agreement provided, in language not dissimilar from the agreement involved in this case, that "[s]hould difference arise * * * as to the meaning and application of the provisions of this Agreement, *or should any local trouble of any kind arise*", that upon failure to reach a settlement by negotiation, "the matter shall be referred to an impartial umpire for decision".

In reversing the District Court which refused to compel the company to arbitrate, Warrior held that "the hostility evinced by courts toward arbitration of commercial agreements has no place here" because "arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself" (363 U.S. l.c. 578, 80 S.Ct. l.c. 1350, 4 L.Ed.2d 1409). Warrior recognized the facts of industrial strife and life when it accepted the late Dean Shulman's comment that the parties to a labor agreement, unlike the parties to an ordinary commercial contract, in order that some agreement be signed, are sometimes forced to agree to provisions that sometimes do little more than leave problems to future

consideration with an expression of hope and good faith". See Shulman, Reason, Contract and Law in Labor Relations, 68 Harv.L.Rev. 999 (1955), at 1005, quoted on page 580 of 363 U.S., on page 1352 of 80 S.Ct., 4 L.Ed.2d 1409 of Warrior. And cf. Cox, Reflections Upon Labor Arbitration, 72 Harv.L.Rev. 1482 (1959), approvingly cited on page 579 of 363 U.S., on page 1351 of 80 S.Ct., 4 L.Ed.2d 1409 of Warrior.

The majority opinion in Warrior expresses much the same thought as that quoted from Mr. Justice Brennan's concurring opinion in American as to the function and scope of the judicial inquiry that is to be made in an action to enforce an arbitration agreement. After noting that "[t]he Congress, * * * has by § 301 of the Labor Management Relations Act, assigned the courts the duty of determining whether the reluctant party has breached his promise to arbitrate", Warrior held that because "arbitration is a matter of contract * * * a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit".

But such a statement does not change the narrow scope of judicial inquiry commanded by § 301. Warrior was explicit in establishing the standards of judgment to be applied and followed (363 U.S. l.c. 582, 80 S.Ct. l.c. 1352, 1353, 4 L.Ed.2d 1409):

> "Yet, to be consistent with congressional policy in favor of settlement of disputes by the parties through the machinery of arbitration, the judicial inquiry under § 301 must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance or did agree to give the arbitrator power to make the award he made. An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the

asserted dispute. Doubts should be resolved in favor of coverage."

And more specifically, the Supreme Court held in Warrior that:

> "Apart from matters that the parties specifically exclude, all of the questions on which the parties disagree must therefore come within the scope of the grievance and arbitration provisions of the collective agreement."

To which must be added this further expression on exclusion:

> "In the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail, * * *."

And, as to what action a District Court must take if it concludes that there is no real doubt but that the arbitration clause is broad enough to cover the dispute, Mr. Justice Brennan, concurring in American, held (363 U.S. l.c. 571, 80 S.Ct. l.c. 1364, 4 L.Ed.2d 1403):

> "On examining the arbitration clause, the court may conclude that it commits to arbitration any 'dispute, difference, disagreement, or controversy of any nature or character.' With that finding the court will have exhausted its function, except to order the reluctant party to arbitration."

Stated simply, our judicial inquiry is "strictly confined" by Congress and the Supreme Court to an examination of the parties' complete intent and our determination of that question is to be aided by our resolution of doubt in favor of coverage, particularly when it can not be said with "positive assurance that the arbitration clause is not susceptible of an interpretation" of coverage and particu-

larly when the parties have not "specifically excluded" the arbitration of the particular difference involved. In the latter situation "only the most forceful evidence of a purpose to exclude" must be present before we can deny coverage.[1]

Apart from the exact language of the agreement, it would seem to us that the only reasonable inference that can be drawn from the data before us is that the parties effectuated a truce when they agreed upon Article VI of their present agreement in 1960. Ten cents an hour was agreed upon as the amount employers were to pay "into a health and welfare insurance program" but payments were not to begin until April 1, 1962. Such was the message that the negotiators took back to their principals in order to obtain approval of the contract.[2] The details of how that

1. We do not believe it necessary in this case to analyze in detail the two cases decided by the Supreme Court in June of this year. Those cases applied the doctrines announced in the cases just discussed. Atkinson v. Sinclair Refining Co., supra, fell factually on one side of the line; Drake Bakeries on the other. For comment consistent with our analysis of the cases decided by the Supreme Court in 1957 and 1960, see the new text added to § 1930 on page 142 of the 1962 Cumulative Supplement to Vol. Six of Williston on Contracts, and Isaacson, The Grand Equation: Labor Arbitration and the No-Strike Clause, October, 1962, 48 A.B.A.J. 914.

2. Shulman, supra, at 1004-5, we think correctly points out that "while the interpretations or explanations made at the membership meetings can hardly bind the employer, it is nevertheless important that the agreement be not such as to become a promise to the ear but a disappointment to the hope of the membership". And Cox suggests, we also think correctly, that the principle applicable to both parties in all contracts (stated in § 570 of Williston on Contracts) to the effect that "in every contract there exists an implied covenant of good faith and fair dealing", is particularly applicable to collective bargaining agreements. See also Mr. Justice Brennan's concurring opinion in American, supra, where he commented on the "implied covenants of good faith and fair dealing" to which the parties to a collective bargaining agreement are to be judicially held.

was to be worked out were left to the draftsmen of the agreement and to their lawyers. The agreement eventually provided that "ten cents (10¢) per hour * * * (would) be paid * * * into a health and welfare insurance program in accordance with a Trust Agreement to be agreed upon between the parties".

And what must be said as to the intention of the parties in the event differences arose between them as to the exact terms of the Trust Agreement? Certainly neither party can now say that the provisions of the arbitration clause would not come immediately into play. How else can and will the problem ever be settled? And settled it must be if the policy of the Congress in regard to arbitration clauses in collective bargaining agreements is carried out in accordance with the law of the land as declared by the Supreme Court of the United States in the cases we have cited.

The language used by the parties in Article IX is as broad as could be chosen. They voluntarily agreed that "any differences" were to be arbitrated. That clause is as broad, if not more broad than the clauses involved in Warrior, in Signal-Stat Corporation v. Local 475, 2 Cir., 1956, 235 F.2d 298, in Yale & Towne Mfg. Co. v. Local Lodge No. 1717, 3 Cir., 1962, 299 F.2d 882, in Butte Miner's Union No. 1 v. Anaconda Company, D.C. Mont. 1958, 159 F.Supp. 431, and in Tenney Engineering Inc. v. United Elec. R. & M. Wkrs., D.C.N.J. 1959, 174 F.Supp. 878. And certainly Cox, supra, at 1501, stated a truism when he said that "experienced negotiators are thoroughly aware of their ability to choose between the comparatively narrow clause * * * covering only 'disputes concerning the interpretation and application' of the collective bargaining agreement * * * and a wide open undertaking to arbitrate 'any dispute, difference, disagreement or controversy of any

nature or character' which may arise during the term of the agreement".

For the uninitiated, Cox, at 1508, explains in regard to a "wide open" arbitration that "an undertaking to arbitrate 'any dispute, difference, disagreement, or controversy of any nature or character' is certainly broad enough to cover disputes about the meaning of the arbitration clause; if either party refuses to submit a question of arbitrability to arbitration, there is the breach of promise necessary for judicial relief".

We cannot think of any language that could have been used in the agreement before us that would express any broader intention to arbitrate any differences that might arise between the parties during the life of the agreement.[3]

Had the parties intended to exclude all differences except those confined to the "interpretation or application of the existing contract" they would have so provided. They did not do so, with the result that there are no doubts to resolve in this case. If doubts were present, created either by reason of the language of the agreement or by other possible factual circumstances that would tend to support the idea that there could have been an intention

3. Defendant's argument about the alleged complexity of what is now a not uncommon part of many labor agreements expresses a lack of confidence in the whole procedure of arbitration that is, contrary to defendant's agreement to the broadest sort of an arbitration clause. We are confident that both parties were and are familiar with the fact that it is not revoluntary for parties to agree that health and welfare Trust Agreements are to be the subject of arbitration. See also, Empire State Master Hairdressers' Assn., Inc. v. Journeymen Barbers, etc., where the New York Supreme Court, 231 N.Y.S.2d 662; Id., App.Div., 236 N.Y.S.2d 371, sent the negotiation of a health and welfare fund to arbitration.

to exclude the particular difference from the coverage of the arbitration clause, we would have a different case.

In dealing with such a different case we would be required to determine whether there is any "forceful evidence of a purpose to exclude the claim from arbitration" for we cannot, under the mandate of Warrior, adversely resolve the doubts in favor of coverage "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute". We therefore do not reach in this case the question of what procedure is to be followed in a case in which we would be required to resolve possible doubts that might have been created by the language of the agreement.[4]

The cases relied upon by defendant are not, with one possible exception, inconsistent with our decision of this case. We would have ruled Couch v. Prescolite Manufacturing Corporation, supra, as did Judge Henley because there the limitation of the arbitration clause was not only confined to the "interpretation or meaning of any written provision of this agreement", but another clause of the contract provided, as Judge Henley twice mentioned, that the parties had expressly agreed to arbitrate certain particular wages when the contract was negotiated. Those wages were not the ones involved in the dispute, all of which supported the inference that the omission of any express agreement to arbitrate the future wages evidenced

4. We do not, however, anticipate any particular difficulty in formulating proper preliminary procedural steps to be taken in such a case because we have a wealth of federal precedent built up in the not dissimilar situations that involve the scope of our preliminary judicial inquiry into general federal jurisdictional questions; that require preliminary resolution of our bankruptcy plenary or summary jurisdiction; and many others which require our determination of preliminary questions of law which sometimes require factual determinations before we act.

an intent that they were excluded from the scope of the arbitration clause. We would not, however, have accepted Boston Printing Pressman's Union v. Potter Press, D.C.-Mass.1956, 141 F.Supp. 553, affirmed 1 Cir., 1957, 241 F.2d 787, cert. den. 355 U.S. 817, 78 S.Ct. 21, 2 L.Ed.2d 34, as did Judge Henley. We think both the force and the validity of Judge Wyzanski's fear about "judges * * * exercising quasi-legislative magistracy over labor problems of uncertain dimension" is dispelled by what the Supreme Court has held since Judge Wyzanski was pioneering in this not uncomplicated field of law.[5]

Communication Wks. of Amer. v. New York Telephone Co., S.D.N.Y.1962, 209 F.Supp. 389, is similarly distinguishable because there the parties expressly provided that "any grievance or dispute arising out of this Section 9.08 be subject to the arbitration provisions of this agreement". The grievance was one that involved that section and Judge Tyler held on the facts, as I would have also held on the facts, that "the exclusionary language in Section 9.08 * * * is clear beyond reasonable dispute and thus controlling". Pacific Northwest Bell Telephone Co. v. Communication Workers, 9 Cir., 1962, 310 F.2d 244, unlike Judge Tyler's case, and unlike this case, involved a case where there was a reasonable dispute as to the intention of the parties as expressed in their agreement. The Ninth Circuit reversed the District Judge who, under those factual circumstances,

5. Even before the Supreme Court decisions, it is apparent that some federal judges did not share Judge Wyzanski's fear. See, for example, Northland Greyhound Lines v. Amalgamated Assn., Etc., D.C.Minn. 1946, 66 F.Supp. 431, appeal dismissed 8th Cir., 1946, 157 F.2d 329, where Judge Joyce ordered the parties to arbitrate hours, wages and working conditions. And it is also interesting to note that while Mr. Justice Frankfurter vigorously dissented in Lincoln Mills, on grounds not dissimilar to those expressed by Judge Wyzanski, he concurred in all the 1960 decisions of the Supreme Court cited in this memorandum.

"excluded from evidence history of the bargaining from which the contract resulted". The Court of Appeals ordered the District Court to follow the sort of procedure that we indicated in footnote 4 we would follow in a doubtful case if one were presented to us. This case, involving clauses about which there can be no reasonable doubt, is not such a case.

Rule 12(b) provides that should we treat a motion to dismiss as a motion for summary judgment, "all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56". The wisdom of that rule is demonstrated by the fact that the Court needs additional guidance from counsel for both sides both as to the substance and the form of order that should be entered in this case. It is apparent from defendant's suggestions in support of its motion that in spite of the fact that federal law controls, the parties have instituted certain litigation in the State court and that at least some of that litigation is on the way to the Supreme Court of Missouri.[6]

It is obvious that the fundamental differences between the parties in regard to the Trust Agreement of which this case is apparently but one facet, are not going to be settled until the parties get out of this and other courts of law and commence, in good faith, to follow their agreed procedures of negotiation and arbitration. Whether we can take official judicial notice of the fact or not, we cannot erase from our private memory as a citizen our recollection that

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6. Defendant, in a footnote, also informs us that it looks forward to even further and more lengthy complicated litigation because it forecasts that "the nature of the proceedings and relief sought in the State court proceeding give rise to possible additional contentions against plaintiff's complaint in this case, but these contentions must necessarily await a determination on the motion to dismiss filed by defendant in this proceeding".

the collective bargaining agreement involved in this case was entered into only after months of unlimited legal and economic warfare between the parties and that while the agreement was made "effective June 17, 1960" it was not actually executed until long after that date. At any rate, and without the application of any judicial notice doctrine, it is clear beyond reasonable doubt that the parties did agree to settle their differences by agreeing that until March 31, 1965 "there shall be no stoppage of work on account of any differences which may occur"; by agreeing that the details concerning the Trust Agreement would be "agreed upon between the parties", and by agreeing that should "any differences" arise in connection with that or any other matter, the parties would proceed to "final and binding" arbitration.

In so doing, the parties adopted a method and a policy for the settlement of their economic quarrels that is approved and required by both the Congress and the Supreme Court of the United States. That policy is, in the language of Dean Shulman:

> "* * * an integral part of the system of self-government. And the system is designed to aid management in its quest for efficiency, to assist union leadership in its participation in the enterprise, and to secure justice for the employees. It is a means of making collective bargaining work and thus preserving private enterprise in a free government."

Courts cannot force the parties to be reasonable.[7] But courts can force the parties to use the means of settlement that they have agreed to use in the event the usual

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7. See Shulman, supra, at 1024, where he suggests that: "* * * the courts cannot, by occasional sporadic decision, restore the parties' continuing relationship; and their intervention in such cases may seriously affect the going systems of self-government. When their autonomous system breaks down, might not

processes of collective bargaining prove, for any reason, to be ineffectual. Courts must, however, also recognize the distilled wisdom in the adage about the inclination of a horse's desire to quench his thirst.

As we have suggested, this Court is in need of the suggestions of counsel as to how the obstacles that stand in the way of orderly negotiation and arbitration are to be removed. They are necessarily better informed as "to the nature of the problem", but we are all to remember that the available "range of judicial inventiveness", to borrow again the language of Mr. Justice Douglas in Lincoln Mills, is unlimited.

In the exercise, therefore, of both our inherent equity power (see Mr. Justice Burton's concurring opinion in Lincoln Mills, 353 U.S. at 460, 77 S.Ct. at 919, 920, 1 L.Ed.2d 972) and the power conferred by Rule 56(d) to direct such further proceedings in the action as are just, we do hereby order that:

1. The parties shall be allowed twenty (20) days in which to explore the possibility of whether they may, consistent with what we have determined in this memorandum and order, suggest an agreed form of order for approval of this Court, that will provide for the dismissal of all pending litigation in this or any other court, and which will provide a time schedule for collective bargaining in regard to the terms that shall be included in the Trust Agreement, together with an express provision that should an agreement not be reached by a day certain, that the matter shall then be immediately referred to an Arbitration Board selected in accordance with Article IX of the agreement between the

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the parties better be left to the usual methods for adjustment of labor disputes rather than to court actions on the contract or on the arbitration award? I suggest that the law stay out—but, mind you, not the lawyers."

parties. The names of the persons who will serve on the Arbitration Board shall be named in the proposed order.

2. Should the parties be unable to agree on a proposed order, then they shall, within twenty-five (25) days of the date of this Memorandum and Order, file whatever matters permitted to be filed by Rule 56, together with a suggested form of order that each party believes should be entered. Should such a proposed order include a provision that would require the exercise of our *in personam* equity jurisdiction, in order that any party be directed, on pain of contempt, to dismiss or take other action in connection with any litigation pending in any court other than this Court, such party shall also submit a brief which shall cite the legal authorities in support of such a provision in their proposed order.

3. Should counsel desire any clarification of the requirements of this order, we will be happy to schedule an informal conference with both parties at a convenient time.

IT IS SO ORDERED.

Final Opinion of District Court—217 F. Supp. 1

Not Reprinted Here—See p. 59

Opinion of Court of Appeals—326 F.2d 867

SANBORN, Circuit Judge.

This is an appeal by the defendant, Builders Association of Kansas City,[1] from a summary judgment for the

1. The Builders Association of Kansas City is an association composed of commercial and industrial contractors, subcontractors, residential builders, and suppliers of various kinds in the building business, largely in the metropolitan area of Kansas City. Its membership is approximately 600 firms.

plaintiff (appellee)[2] in an action brought by it under § 301(a) of the Labor Management Relations Act, 1947, 61 Stat. 156, 29 U.S.C. § 185(a), to enforce arbitration of a dispute arising out of a collective bargaining agreement.

The agreement contains the following provisions:

"ARTICLE IX—ARBITRATION.

"There shall be no stoppage of work on account of any differences which may occur between a member or members of the Association and the Union. If the matter cannot be adjusted between the parties involved, it shall be taken up between a representative of the Union, and a representative of the Association. If then the matter cannot be settled satisfactorily, it shall be immediately referred to an Arbitration Board consisting of three members appointed by the Association and three members appointed by the Union. These six men shall have authority to choose a neutral third party who shall act as arbiter and the decision of the arbiter shall be final and binding upon both parties and must be in writing."

"ARTICLE VI—HEALTH AND WELFARE.

"Effective April 1, 1962, ten cents (10¢) per hour for all classifications shall be paid by employers into a health and welfare insurance program in accordance with a Trust Agreement to be agreed upon between the parties.

"At the time of the establishment of such Health & Welfare Plan, provisions may be inserted in this

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2. Plaintiff, Greater Kansas City Laborers District Council, is a labor organization as defined in Section 2(5) of the Labor Management Relations Act, 1947, 29 U.S.C. § 152(5), composed of delegates from affiliated locals and organized July 21, 1947, under the Constitution of the International Hod Carriers, Building and Common Laborers Union of America, as adopted by its Fourteenth Convention, October 16-20, 1961.

Agreement to authorize suit for the collection of any delinquent accounts owing to such Health & Welfare Fund."

The claim stated in the complaint was, in substance, that the parties, who are subject to the Act, had been unable to agree upon a trust agreement as provided by Article VI of the collective bargaining agreement, and that the defendant had declined the plaintiff's requests to arbitrate the dispute.

The factual and legal basis for the conclusion that the plaintiff was entitled to summary judgment to compel the defendant to arbitrate the dispute has been thoroughly and exhaustively covered by Judge Oliver in his two opinions reported in 213 F.Supp. 429 and 217 F.Supp. 1. We shall avoid useless repetition.

The defendant asserts that the District Court erred: (1) in ordering arbitration of a nonarbitrable dispute having to do with the creation of a new agreement; (2) in ruling that the parties had agreed to arbitrate such a dispute, (a) because the record shows that they did not so agree, and (b) because there were material issues of fact relating to the intent of the parties which precluded the entry of summary judgment; (3) in ruling that the plaintiff had standing to bring the action; and (4) in failing to apply the equitable "unclean hands" doctrine to the plaintiff's claim.

It seems to us, as it did to Judge Oliver, that implications to be drawn from the decisions of the Supreme Court in *United Steelworkers of America* v. *American Manufacturing Co.*, 363 U.S. 564; *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574; *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593; *Drake Bakeries, Inc.*, v. *Local 50, American*

Bakery & Confectionery Workers International, 370 U.S. 254; and *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, not only justified but required the entry of the judgment under review. Undoubtedly the parties to the collective bargaining agreement could have excluded from the arbitration clause any and all disputes arising under Article VI, but they did not do so. The Supreme Court in *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, supra, pages 581, 584, 585 of 363 U.S., made the following statements:

> "Apart from matters that the parties specifically exclude, all of the questions on which the parties disagree must * * * come within the scope of the grievance and arbitration provisions of the collective agreement. The grievance procedure is, in other words, a part of the continuous collective bargaining process. It, rather than a strike, is the terminal point of a disagreement.
>
> * * * * * * * *
>
> "* * * In the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim for arbitration can prevail, particularly where, as here, the exclusion clause is vague and the arbitration clause quite broad. * * *
>
> * * * * * * * *
>
> "The judiciary sits in these cases to bring into operation an arbitral process which substitutes a regime of peaceful settlement for the older regime of industrial conflict. * * *"

It is our conclusion that the dispute arising under Article VI was arbitrable, as the trial court ruled. That the dispute arose out of the failure of the parties to conform to their undertaking to agree upon a trust agreement in accordance with which contributions by employers to the health and welfare insurance program were to be paid,

we think did not remove the dispute from the coverage of Article IX, the arbitration provisions.

The defendant, to support its contention that the dispute in suit is not arbitrable because it concerns the creation of a new agreement, relies upon the decision of Judge Wyzanski in *Boston Printing Pressmen's Union* v. *Potter Press*, D.C.D. Mass., 141 F. Supp. 553 (1956), affirmed 1 Cir., 241 F.2d 787 (1957), cert. denied, 355 U.S. 817. The case arose several years before the *Steelworkers* cases were decided by the Supreme Court. The question was whether a federal court could, by virtue of § 301 of the Labor Management Relations Act, compel an employer, under a collective bargaining agreement, to submit to arbitration the terms of a new agreement to replace the old, where the old agreement provided that all unreconcilable questions regarding the making of a new agreement should be decided by arbitration. The District Court said (page 554 of 141 F.Supp.):

> "Stated summarily, plaintiff's complaint seeks a mandatory injunction enforcing the parties' written agreement to submit to arbitration a new contract to govern employment conditions at defendant's plant following the expiration on September 1, 1954, of their collective bargain. In short, the Court is asked to direct what may conveniently be described as a *prospective or quasi-legislative* arbitration establishing future labor conditions not *specifically* envisaged in their earlier contract. This is, at least with respect to industrial labor problems, a novel problem not hitherto adjudicated by a federal court acting under the asserted authority of § 301 of the Taft-Hartley Labor Management Relations Act of 1947, 61 Stat. 156, 29 U.S.C.A. § 185."

It was held that the federal court was without authority to compel arbitration of the dispute. In the light of what we conceive to be the teachings of the Supreme Court in

the cases to which we have referred, we are convinced that the decision in *Boston Printing Pressmen's Union* v. *Potter Press*, is far too weak a peg upon which to hang a reversal of the judgment in the instant case.

To avoid any misconception of our rulings in the instant controversy, we hold (1) that the dispute arising under Article VI of the collective bargaining agreement was, by the terms of Article IX, an arbitrable dispute; (2) that neither by express agreement of the parties nor by necessary implication was the dispute one excluded from arbitration; (3) that the collective bargaining agreement expressed in unambiguous language the intention of the parties that arbitration should be resorted to for settlement of disputes; and (4) that there were no factual issues precluding the District Court from entering summary judgment.

Judgment affirmed.

Judgment

This Cause came on to be heard on the record from the United States District Court for the Western District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed.

January 23, 1964.

Order Denying Petition of Appellant for a Rehearing

There is before the Court appellant's petition for rehearing en banc and on consideration of such petition, it is the order of the Court that the petition for rehearing en banc be, and it is hereby, denied.

It is further ordered that the petition for rehearing be, and it is hereby, denied.

February 28, 1964.

Order Staying Issuance of Mandate

On Consideration of the motion of appellant for a stay of the mandate in this cause pending a petition to the Supreme Court of the United States for a writ of certiorari, it is now here ordered by this Court that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari and record have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

March 5, 1964.

Section 302, Labor Management Relations Act of 1947, As Amended; 29 U.S.C., Section 186; 61 Stat. 157; 73 Stat. 537

(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees

of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b) (1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

(2) It shall be unlawful for any labor organization, or for any person acting as an officer, agent, representative, or employee of such labor organization, to demand or accept from the operator of any motor vehicle (as defined in section 301-327 of Title 49) employed in the transportation of property in commerce, or the employer of any such operator, any money or other thing of value payable to such organization or to an officer, agent, representative or employee thereof as a fee or charge for the unloading, or in connection with the unloading, of the cargo of such vehicle: *Provided*, That nothing in this paragraph shall be construed to make unlawful any payment by an employer to any of his employees as compensation for their services as employees

(c) The provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer to any of his employees whose established duties include acting openly for such employer in matters of labor relations or personnel administration or to any representative of his employees, or to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided*, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; (5) with respect to money or other thing of value paid to a trust fund established by such representative for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on

retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; or (6) with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs: *Provided*, That the requirements of clause (B) of the

proviso to clause (5) of this subsection shall apply to such trust funds.

(d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both.

(e) The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 381 of Title 28 (relating to notice to opposite party) to restrain violations of this section, without regard to the provisions of section 17 of Title 15 and section 52 of this title, and the provisions of sections 101-110 and 113-115 of this title.

(f) This section shall not apply to any contract in force on June 23, 1947, until the expiration of such contract, or until July 1, 1948, whichever first occurs.

(g) Compliance with the restrictions contained in subsection (c) (5) (B) of this section upon contributions to trust funds, otherwise lawful, shall not be applicable to contributions to such trust funds established by collective agreement prior to January 1, 1946, nor shall subsection (c) (5) (A) of this section be construed as prohibiting contributions to such trust funds if prior to January 1, 1947, such funds contained provisions for pooled vacation benefits.

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No. 959.

In the Supreme Court of the United States

October Term, 1964.

BUILDERS ASSOCIATION OF KANSAS CITY, *Petitioner*,

vs.

GREATER KANSAS CITY LABORERS DISTRICT COUNCIL OF THE INTERNATIONAL HOD CARRIERS, BUILDING, AND COMMON LABORERS UNION OF AMERICA OF GREATER KANSAS CITY AND VICINITY, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

BRIEF FOR GREATER KANSAS CITY LABORERS DISTRICT COUNCIL OF THE INTERNATIONAL HOD CARRIERS, BUILDING AND COMMON LABORERS UNION OF AMERICA OF GREATER KANSAS CITY AND VICINITY.

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United Steel Workers v. American Manufacturing Co., 363 U. S. 564 (1960)

United Steel Workers v. Warrior & Gulf Navigation Company, 363 U. S. 574 (1960)

United Steel Workers of America v. Enterprise Wheel and Car Corp., 363 U. S. 593 (1960)

United States v. Livingston, U. S. , March 30, 1964)

In the Supreme Court of the United States

October Term, 1964.

BUILDERS ASSOCIATION OF KANSAS CITY, *Petitioner*,

vs.

GREATER KANSAS CITY LABORERS DISTRICT COUNCIL OF THE INTERNATIONAL HOD CARRIERS, BUILDING, AND COMMON LABORERS UNION OF AMERICA OF GREATER KANSAS CITY AND VICINITY, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

BRIEF FOR GREATER KANSAS CITY LABORERS DISTRICT COUNCIL OF THE INTERNATIONAL HOD CARRIERS, BUILDING AND COMMON LABORERS UNION OF AMERICA OF GREATER KANSAS CITY AND VICINITY.

No. 969

QUESTIONS PRESENTED.

1. Whether the United States District Courts have equity jurisdiction or authority to grant specific performance of an arbitration clause in a collective bargaining agreement for the purpose of establishing a trust fund to receive and distribute monies contributed pursuant to such a fund for the purpose of carrying out a health and welfare program.

2. Whether in construing the intent of the parties respecting arbitrability, Federal courts may not follow a presumption of arbitrability because of the substance of the dispute to be arbitrated.

3. Whether a Federal court must anticipate an award which might be in violation of the law and, therefore, deny arbitration in anticipation of such an illegal result.

STATEMENT.

The statements of facts as set forth in the Petition are substantially correct and are recitations from a stipulation entered into by the parties (R. 7 through 14). The factual situation is perfectly clear. On June 16, 1960, the petitioner and the respondent entered into a collective bargaining agreement (R. 7-9). In that agreement it was agreed, among other things, that effective April 1, 1962, the employers would make contributions of ten cents (10c) per hour for all classifications into a Health and Welfare Insurance Program. This program was to be conducted pursuant to a "Trust Agreement to be agreed upon between the parties" (R. 33). The petitioner and the respondent were never able to agree upon such a trust agreement. The respondent took the position that the contributions should be made to a trust fund known as Construction Industry Laborers Welfare Fund. The petitioner took the position that a new trust fund should be set up for handling these particular contributions.

Negotiations began on this dispute in January of 1962 (R. 10-11). The respondent demanded that the dispute over the trust agreement be submitted to arbitration (R. 42, 43). The petitioner refused and has continued to refuse to submit this issue to arbitration.

The arbitration clause, which is Article IX of the Agreement, provides that:

> "There shall be no stoppage of work on account of any differences which may occur between a member or members of the Association and the Union. If this matter cannot be adjusted between the parties involved, it shall be taken up between a representative of the Union and a Representative of the Association

If then the matter cannot be settled satisfactorily, it shall be immediately referred to an Arbitration Board consisting of three members appointed by the Association and three members appointed by the Union. These six men shall have authority to choose a neutral third party who shall act as arbiter and the decision of the arbiter shall be final and binding upon both parties and must be in writing."

Respondent brought suit to compel the petitioner to arbitrate the dispute which had arisen between them. It requested the District Court to require the respondent to submit to arbitration this dispute. The Federal District Court on a motion for summary judgment gave the Respondent the relief requested (213 F. Supp. 429, 217 F. Supp. 14. The decision was appealed by the petitioner to the Eighth Circuit which rendered a decision adverse to them (326 F. 2d 867).

REASONS FOR DENYING THE WRIT.

1. The United States Supreme Court in a number of recent decisions has clearly expressed the view that under arbitration clauses as broad as the one involved here, the courts should, as a matter of course, enforce the arbitration clauses. *United Steel Workers of America v. American Manufacturing Company*, 363 U. S. 564; *United Steel Workers of America v. Warrior and Gulf Navigation Company*, 363 U. S. 574; *United Steel Workers of America v. Enterprise Wheel and Car Corp.*, 363 U. S. 593; *Drake Bakeries, Inc. v. Local 50 American Bakery and Confectionery Workers International*, 370 U. S. 254.

As stated by the Court of Appeals, the clear implications from these decisions not only "justified" but "required" the ruling of the District Court:

> The petitioner in his petition is relying almost entirely upon the decision of Judge Wyzanski in *Boston Printing Pressmen's Union v. Potter Press*, D. C. D. Mass. 141 F. Supp. 353 (1956), affirmed 241 F. 2d 787 (1957), cert. denied 355 U. S. 817. That decision which was written several years prior to the Steel Workers cases involved a question of whether or not an employer could be forced to arbitrate the terms and provisions of a new contract under an arbitration clause contained in an old agreement. At that time, Judge Wyzanski was seriously concerned with the Constitutionality of Section 301 of the Labor Management Relations Act, if it could be used to compel arbitration of all the terms and conditions of a new contract. At that time there was substantial doubt as to whether Section 301 of the Labor-Management Relations Act could be used to compel arbitration under any executory agreement. Since that time, the Supreme Court in

clearly indicated that a presumption exists in favor of arbitrability, particularly in the Warrior and Gulf case, *supra*, at Pages 581, 584, 585 of 363 U. S. 574, wherein it made the following statements:

> "Apart from matters that the parties specifically exclude, all of the questions on which the parties disagree must * * * come within the scope of the grievance and arbitration provisions of the collective agreement. The grievance procedure is, in other words, a part of the continuous collective bargaining process. It, rather than a strike, is the terminal point of a disagreement.
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> * * * * * * *
>
> * * * In the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim for arbitration can prevail, particularly where, as here, the exclusion clause is vague and the arbitration clause quite broad. * * *
>
> * * * * * * *
>
> "The judiciary sits in these cases to bring into operation an arbitral process which substitutes a regime of peaceful settlement for the older regime of industrial conflict. * * *"

Petitioners will call to the Court's attention the most recent decision of the Fifth Circuit in *Mailers Union v. Newspaper, Inc.* ..... Fed. ..... 55 LRRM 2693 (March 13, 1964). The court in that case refused to enforce an arbitration clause which apparently required the parties to arbitrate the terms and conditions of a *new* agreement. The actual facts are not set forth in the appellate court and the District Court's decision is unreported. The opinion is brief and simply notes that it believes the Boston Printing case is still good law. It gives no explanation for its decision and refers to no case by the Supreme Court in support thereof.

It is respectfully submitted that the decisions of the United States Supreme Court cited above and the recent decision in the matter of *Wiley & Sons v. Livingston*, ... U. S. ..... (March 30, 1964), constitute a complete answer to the problem in the case at bar. The dispute in the immediate case cannot easily be described as one requiring a "legislative" rather than a "judicial" award any more than the disputes in the Livingston case can be broken down into "procedural" or "substantive" aspects.

It must be remembered that the dispute in the immediate case does not require the arbitrator to determine whether or not the employers should make health and welfare payments but relates only as to the *methods* of passing benefits to the employees. As this Court has already clearly indicated it is unrealistic to attempt to put a label on a dispute and then declare that it is arbitrable or not arbitrable, based on the label given to the dispute. *John Wiley & Sons v. Livingston, supra.* Since this Court in the above decided cases has clearly answered the legal questions involved, no sound reason exists for the granting of certiorari.

2. The second issue presented by the petitioner does not truly involve a legal question sufficient under any circumstance to justify the issuance of a writ. Petitioner argues that the lower courts misconstrued the breadth of the arbitration clause. It actually is presenting an argument which is different from that presented in the lower court, to wit, that the contract clause did not apply to disputes between the petitioner and the respondent but only to disputes between *members* of the respondent and employees. Originally, they simply argued that this *dispute* was not subject to arbitration.

The arbitration clause quoted above speaks for itself. The petitioner cannot separate its identity from all of its members. Petitioners' reliance on *Atkinson* v. *Sinclair Refining Company*, 370 U. S. 238 is ill founded. The arbitration clause in that case did not even mention the employer. In the immediate case the representative of the Association is the sole employer party who can take matters to arbitration. In any event, the United States Supreme Court has answered the argument in the Livingston case cited above. The other cases cited by petitioner do not present facts which in any way compare to the immediate matter.

3. Petitioner argues that the lower courts erred in refusing to make a finding concerning the alleged illegality of an award which was desired by the respondent. This does not constitute grounds for granting the writ.

At this point no one knows who the arbitrator will be, what the exact positions of the parties will be, or what award will be made. It is elementary that a court should not make a declaratory judgment on a completely hypothetical set of facts. In addition this Court has repeatedly stated that the courts are not to inquire into the merits of the dispute. *John Wiley* v. *Livingston*, *supra*. The argument that the hopes and aspirations of respondent might be satisfied, through an allegedly unlawful award and therefore the issue of illegality should be presented to the court and decided by it, is untenable. This issue has been clearly covered by opinions of this Court.

Conclusion.

It is respectfully submitted that a writ of certiorari not be granted because there is no real conflict in the law on any question. The United States Supreme Court has in the past few years rendered numerous decisions, which, as the Circuit Court of Appeals has said, "not only justified but required" the entry of the judgment. It should be further noted that since the decision of the Circuit Court of Appeals the United States Supreme Court has rendered an additional opinion the Livingston case which provided for even greater "legislative" relief than is required here. No real question of law exists. Further, the case at bar does not present any important question respecting rules of construction for arbitration clauses in labor agreements that has not already been answered, and the question concerning the defense of alleged illegality of a future possible award is not worthy of review.

Respectfully submitted,

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No. 959.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963.

BUILDERS' ASSOCIATION OF KANSAS CITY,
Petitioner,

vs.

GREATER KANSAS CITY LABORERS DISTRICT COUNCIL OF THE INTERNATIONAL HOD CARRIERS BUILDING AND COMMON LABORERS UNION OF AMERICA OF GREATER KANSAS CITY AND VICINITY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

PETITIONER'S REPLY BRIEF.

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No. 959.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1963.

BUILDERS' ASSOCIATION OF KANSAS CITY,
Petitioner,

vs.

GREATER KANSAS CITY LABORERS DISTRICT COUNCIL OF THE INTERNATIONAL HOD CARRIERS BUILDING AND COMMON LABORERS UNION OF AMERICA OF GREATER KANSAS CITY AND VICINITY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

PETITIONER'S REPLY BRIEF.

Respondent's brief opposing certiorari seeks to argue the merits. The weakness of respondent's position is shown by its attempt to rely on *Wiley & Sons* v. *Livingston*, ... U.S. ..... (March 30, 1964), which has no relationship with the case at bar, except that it is a labor arbitration case.

Respondent asserts "there is no real conflict in the law," but cites a Fifth Circuit decision showing the conflict

is growing and vital. In *Mailers Union* v. *Newspapers, Inc.*, ... F.2d ..... 55 LRRM 2693 (text attached), the Court of Appeals for the Fifth Circuit squarely contradicted the opinion below, with respect to the present status of the rule in the *Pressmen's* case (*Boston Printing Pressmen's Union* v. *Potter Press*, D.C., Mass., 141 F. Supp. 553 (1956), affirmed 241 F.2d 787 (1957), cert. denied, 355 U.S. 817). If the *Pressmen's* case is still good law, as the Fifth Circuit believes, the Courts below would have ruled the present case in favor of petitioner (A 12, A 20-1). If the *Pressmen's* rule is bad law, the union was improperly denied relief in the current *Mailers Union* case.

It is respectfully submitted that the conflict over the *Pressmen's* rule should be promptly resolved.

Respectfully submitted,

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April, 1964.

APPENDIX.

Mailers Union v. Newspapers, Inc., United States Court of Appeals, Fifth Circuit (New Orleans).

AUSTIN MAILERS UNION No. 136 v. NEWSPAPERS, INC., No. 20702. March 13, 1964.

HUTCHESON, Circuit Judge.—The material facts of this case are not in dispute and are succinctly set forth by the District Judge in his findings of fact.

Appellant's points of error correctly reflect the two principal issues here involved: (1) whether Sec. 301 of the Labor-Management Relations Act of 1947, 29 U.S.C.A. Sec. 185(a) empowers the federal courts to compel arbitration pursuant to a contract between an employer and a labor organization, as to future contractual provisions; and (2) whether the contract here involved was still in effect when the appellant sought to enforce the arbitration provisions.

In his findings of fact and conclusions of law,[1] the district judge answered these two issues in the negative. Based thereon, he then entered his order and judgment granting appellee summary judgment.

We are of the opinion that the findings of fact are not shown to be clearly erroneous and that on the basis of these facts and the controlling decisions, his conclusions of law were correctly drawn. In support of his opinion, the district judge relied on Boston Printing Pressman's Union v. Potter Press, 141 F. Supp. 553, 38 LRRM 2211, affirmed

1. Austin Mailers Union No. 136 v. Newspapers, Inc., F. Supp.

241 F.2d 787, 39 LRRM 2524, cert. denied 355 U.S. 817, 40 LRRM 2680.

Here appellant vigorously attacks the Potter Press decision as incorrect and the decision appealed from here as wrong. We cannot agree with this view. On the contrary, we are of the opinion that the Potter Press case was correctly decided and that on the findings and conclusions of the district judge, which we approve, the judgment here appealed from must be affirmed.

Affirmed.